S.B.CIVIL MISC. APPEAL NO.914/2005

Rajesh Parihar.
vs.
Chanchal Kumar.

DATE OF JUDGMENT ::: 9.1.2006

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. ML Chhangani, for the appellant

Mr. Dinesh Joshi for Mr. JR Patel, for the respondent.

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At the request of learned counsel for the parties, this appeal is heard finally.

The appellant/plaintiff is aggrieved against the order by which the first appellate court allowed the appeal of the defendant/respondent and remanded the matter back to the trial court after allowing the respondent's application under Section 151 CPC submitted on 3.8.2001.

Brief facts of the case are that in a suit for eviction of tenant, the defendant submitted an application for amendment of the written statement in the trial court on 14.3.2001. The trial court after hearing both the parties allowed the application by order dated 5.5.2001. The defendant was permitted to insert paras no.5 to 9 as additional pleas. Amended written statement was filed on 21.5.2001 and the Court held that there is no need to frame additional issues. The case was fixed for evidence of the defendant and the date was given as 3.8.2001. On 3.8.2001,

the defendant submitted an application under Section 151 CPC and prayed that on the pleas which were allowed by court's order dated 5.5.2001, he may be permitted to cross examine the plaintiff's witnesses. The said application was dismissed by the trial court on 5.9.2001 on the grounds that the facts were in the knowledge of the defendant and he has already cross examined the plaintiff's witnesses on the points which he has raised in the written statement. It appears that the said order was challenged by the defendant by filing SB Civil Revision Petition No.1199/2001 but that was withdrawn on 19.2.2002 with liberty to raise the point in appeal. The defendant after decision of the trial court against him preferred appeal to challenge the decree. In the appeal, he raised the ground that the trial court committed error of law in rejecting his application under Section 151 CPC vide order dated 5.9.2001. The appellate court held that since the amendment was allowed by the trial court in the written statement, therefore, the trial court should have given opportunity to the defendant to cross examine the plaintiff and his witnesses on the pleas which have been incorporated by amending the written statement. The first appellate court after holding so remanded the matter to the trial court vide impugned order. The first appellate court's order of remand dated 24.5.2005 has been challenged by the appellant in this appeal.

According to learned counsel for the appellant, the challenge to the order dated 5.9.2001 in first appeal was not on specific grounds and it was challenged in a very

cursory manner, therefore, the first appellate court should not have set aside the order dated 5.9.2001 and should not have remanded the matter back to the trial court.

It is also submitted that the defendant has already cross examined the plaintiff and his witnesses on the questions which he took by way of amendment in the written statement. It is also submitted that when party has cross examined the witnesses, the matter cannot be remanded for further cross examination of the witnesses for filling up of the lacunae.

Learned counsel for the appellant also relied upon judgment of Hon'ble Supreme Court delivered in the case of K.Krishna Reddy and others vs. The Special Dy. Collector, Land Acquisition Unit II, LMD Karimnagar, Andhra Pradesh reported in AIR 1988 SC 2123 wherein the Hon'ble Apex Court held that remand should not be made lightly and unless evidence is totally lacking. The Hon'ble Apex Court held that remand means another round of litigation.

Learned counsel for the appellant also relied upon judgment of Orissa High Court delivered in the case of Nilamani Dibya and another vs. Biswanath Mohapatra and another reported in AIR 1987 Orissa 227 wherein the Orissa High Court held that the issue directly involved and evidence led by the parties in civil court, in such situation, the appellate court has no power to remand the case in absence of application for amendment of plaint or for adducing additional evidence.

Learned counsel for the appellant also submitted that when the facts were in knowledge, omission on the part of

counsel to put question cannot be a ground to recall the witnesses. For this, learned counsel for the appellant relied upon judgment of this Court delivered in the case of Krishna Kumar Sharma vs. Smt. Bhagwati Devi and ors. reported in 1998 WLC (Raj.) UC 432.

Learned counsel for the appellant also relied upon judgment of Andhra Pradesh High Court delivered in the case of Thuraka Onnuramma and another vs. Tahsildar, Kadiri and others reported in AIR 1980 Andhra Pradesh 267 dealing with the issue about recalling of the witnesses at the instance of one of the parties. The Andhra Pradesh High Court held that the application for recalling, made after the arguments were over and judgment was reserved, could not have been allowed under Section 151 CPC.

Yet another judgment of this Court, was relied upon by learned counsel for the appellant, delivered in the case of Ram Rai vs. Smt. Sulochna Devi reported in 2000 WLC (Raj.) UC 323 wherein this Court held that Order 18 Rule 17 CPC authorises the Court to recall witness but for purpose of putting any question which court itself might think necessary but does not authorise party to have recalled for cross-examination of witness already cross-examined.

Learned counsel for the appellant further relied upon judgment of this Court delivered in the case of Prahlad Das vs. Karunaram & another reported in 1999 DNJ (Raj.) 37 wherein this Court held that the Court will not help a party which sleeps over the matter and will not wait for his counsel to appear. In that case, it was alleged that the petitioner engaged lawyer but the case was not well

pursued in the Court and, therefore, there was no cross examination of the witness, therefore, permission was sought for recall of the witnesses.

I considered the submissions of learned counsel for the parties and perused the record.

It is clear from the facts mentioned above that the trial court itself allowed the amendment of the written statement by order dated 5.5.2001 and permitted the appellant to bring new facts on record. Immediately thereafter, the defendant submitted an application praying that he may be permitted to cross examine the plaintiff and his witnesses on the points which have been incorporated in the written statement. The said application was dismissed by the trial court by observing that the defendant has already examined the witnesses of the plaintiff namely, PW1 to PW4 on the questions relating to ownership of Shiva Hotel as well as about Shyamsa Tandoori Restaurant and alleged 'pol' lying vacant. The trial court held that the defendant fully cross examined these witnesses but now the defendant is seeking to cross examine further which is not proper. It is also observed by the trial court that in the cross examination, the plaintiff stated about actual position of above accommodations and if the defendant was not vigilant, he cannot be permitted to fill in the lacunae.

The facts clearly show that the facts referred and involved in this case are entirely different than the facts mentioned in the judgments referred above. It is not a case

for recalling of the witnesses on the ground that the witnesses were not properly cross examined or something was left out. It is also not the case that the Court should recall the witness for the purpose of Order 18 Rule 17 CPC to put question by the Court. Here in this case, the defendant, who amended the written statement and for which permission was sought and the court allowed that prayer of the defendant, prayed the defendant wants to cross examine the plaintiff and his witnesses, obviously, the defendant can demolish the case of the plaintiff by plaintiff's and his witnesses' cross examination and also can prove his case by some way of cross examination. In these facts and circumstances, it cannot be said that the defendant was allowed to amend the written statement merely because of the reason that he may put into pleading something but will not have right to put the questions about his defence to the plaintiff and his witnesses. The parties have right to prove their case not only by their own evidence but by the admissions of the opponents also.

In view of the above, if the first appellate court exercised its discretion in favour of allowing the cross examination, this Court is not inclined to interfere in the impugned order.

Accordingly, this appeal, having no merit, is hereby dismissed.

(PRAKASH TATIA), J.

S.Phophaliya